

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

MARY L. ANDERSON,)	
)	No. CV-04-5087-MWL
Plaintiff,)	
)	ORDER GRANTING DEFENDANT'S
v.)	MOTION FOR SUMMARY JUDGMENT
)	
JO ANNE B. BARNHART,)	
Commissioner of Social)	
Security,)	
)	
Defendant.)	

BEFORE THE COURT are cross-Motions for Summary Judgment, noted for hearing without oral argument on October 17, 2005. (Ct. Rec. 9, 16). Plaintiff Mary L. Anderson ("Plaintiff") did not file a reply. Attorney Ray R. Whitlow represents Plaintiff; Special Assistant United States Attorney David J. Burdett represents the Commissioner of Social Security ("Commissioner"). The parties have consented to proceed before a magistrate judge. (Ct. Rec. 4). After reviewing the administrative record and the briefs filed by the parties, the Court **GRANTS** Defendant's Motion for Summary Judgment (Ct. Rec. 16) and **DENIES** Plaintiff's Motion for Summary Judgment (Ct. Rec. 9).

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JURISDICTION

On May 16, 2001, Plaintiff filed an application for Disability Insurance Benefits ("DIB"), alleging disability since February 26, 2001. (Administrative Record ("AR") 158-160). The application was denied initially and on reconsideration. On September 16, 2002, Plaintiff appeared before Administrative Law Judge ("ALJ") R.J. Payne, at which time testimony was taken from Plaintiff, medical expert Robert Willkens, M.D., and vocational expert Richard Cheney. (AR 419-484). On April 25, 2003, the ALJ issued a decision finding that Plaintiff was not disabled. (AR 100-111). The Appeals Council denied a request for review on June 28, 2004. (AR 6-10). Therefore, the ALJ's decision became the final decision of the Commissioner, which is appealable to the district court pursuant to 42 U.S.C. § 405(g). Plaintiff filed this action for judicial review pursuant to 42 U.S.C. § 405(g). (Ct. Rec. 1).

STATEMENT OF FACTS

The facts have been presented in the administrative hearing transcript, the ALJ's decision, the briefs of both Plaintiff and the Commissioner and will only be summarized here. Plaintiff was 49 years old on the date of the ALJ's decision. (AR 438, 158, 111).

At the administrative hearing held on September 16, 2002, Plaintiff stated that she completed high school and received a college degree in Liberal Arts from Central Washington University in 1984. (AR 439, 175). She testified that she stands approximately 5'4" tall and weight about 170 pounds. (AR 439, 168). Following college, Plaintiff initially stayed at home with

1 her children. (AR 440). From 1990 to 1993, Plaintiff worked as a
2 Mental Health Counselor at a psychiatric hospital. (AR 441, 170).
3 During her tenure at the psychiatric hospital, Plaintiff worked
4 for over one year as the lead therapist for the adolescent unit.
5 (AR 441). From 1993 to 1996 Plaintiff worked as an intake
6 coordinator at Lutheran Social Services. (AR 444, 170).
7 Beginning in 1996, Plaintiff, along with a business partner,
8 formed Counseling Services of Tri-Cities and worked in that
9 capacity until March of 2001. (AR 445-447, 170).

10 Plaintiff last worked in March of 2001. (AR 169, 447). She
11 reported that she could not handle the stress and acuity at the
12 psychiatric hospital and that fatigue, muscle pain and a lack of
13 concentration prevented her from continuing to work. (AR 169).
14 Plaintiff testified that she stopped working because Dr. Krause
15 told her to take some time off of work. (AR 446). Plaintiff
16 stated that she did not want to take medical leave from work and,
17 due to prior commitments, she waited a couple of months before
18 stopping work. (AR 446-447). She has not worked since. (AR
19 460). Plaintiff testified that she has not attempted to return to
20 work because she no longer has clients. (AR 460). Although she
21 stated that she would hope she could return to counseling, she
22 indicated that she could not see a return to the field in the near
23 future. (AR 460).

24 Plaintiff stated that she has had constant pain in her upper
25 body, neck, head, shoulders and trapezoid region since 1996. (AR
26 447-448). She testified that she has had pain in her elbows,
27 wrists and hands (apparently diagnosed as carpal tunnel syndrome),
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1 muscle spasms in her back region, and pain in her lower
2 extremities. (AR 448-450). On a scale of one to ten, with ten
3 being the worst pain imaginable, she related that her pain was a
4 five generally and a 12 when at its worst. Plaintiff indicated
5 that she also suffered from fatigue in February of 2001, described
6 as being exhausted but not being able to sleep, as well as
7 problems with concentration. (AR 450-451).

8 Plaintiff also testified that she has experienced periods of
9 depression since she ceased working in February of 2001. (AR
10 458). She stated that she had not taken medication for depression
11 until this past year and did not see a psychiatrist, psychologist
12 or counselor for depression. (AR 458-459).

13 Plaintiff testified that, on an average day, she could walk
14 about one-quarter to one-half of a mile. She usually takes a 30-
15 minute walk without difficulty. (AR 452-453). She stated that
16 she could lift five to 10 pounds, stand for about 30 minutes, and
17 sit about one hour without a significant problem. (AR 453-455).

18 Plaintiff indicated that she continues to cook and clean,
19 with assistance from her husband if needed, and is able to do the
20 grocery shopping for 30 minutes to an hour at a time. (AR 455-
21 456). She stated that she was unable to do yard work or work in
22 her rose garden this past year due to fatigue and pain. (AR 456-
23 457). During a typical day, Plaintiff related that the most
24 important thing she does is "stay up" and moving about until it is
25 time for bed. (AR 466-467). She testified that she will "piddle
26 around the house," doing the ironing, laundry and other little
27 tasks around the house. (AR 467). Plaintiff stated that she

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1 attends church services every Sunday, which last approximately one
2 hour and 15 minutes, and occasionally will go out to eat or to the
3 movies with her family. (AR 468-469).

4 Medical expert Robert Willkens and vocational expert Richard
5 Cheney also testified at the administrative hearing held on
6 September 16, 2002. (AR 421-438, 470-481).

7 **SEQUENTIAL EVALUATION PROCESS**

8 The Social Security Act (the "Act") defines "disability" as
9 the "inability to engage in any substantial gainful activity by
10 reason of any medically determinable physical or mental impairment
11 which can be expected to result in death or which has lasted or
12 can be expected to last for a continuous period of not less than
13 twelve months." 42 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A). The
14 Act also provides that a Plaintiff shall be determined to be under
15 a disability only if his impairments are of such severity that
16 Plaintiff is not only unable to do his previous work but cannot,
17 considering Plaintiff's age, education and work experiences,
18 engage in any other substantial gainful work which exists in the
19 national economy. 42 U.S.C. §§ 423(d)(2)(A), 1382c(a)(3)(B).
20 Thus, the definition of disability consists of both medical and
21 vocational components. *Edlund v. Massanari*, 253 F.3d 1152, 1156
22 (9th Cir. 2001).

23 The Commissioner has established a five-step sequential
24 evaluation process for determining whether a person is disabled.
25 20 C.F.R. §§ 404.1520, 416.920. Step one determines if he is
26 engaged in substantial gainful activities. If he is, benefits are
27 denied. 20 C.F.R. §§ 404.1520(b), 416.920(b). If he is not, the

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1 decision maker proceeds to step two, which determines whether
2 Plaintiff has a medically severe impairment or combination of
3 impairments. 20 C.F.R. §§ 404.1520(c), 416.920(c).

4 If Plaintiff does not have a severe impairment or combination
5 of impairments, the disability claim is denied. If the impairment
6 is severe, the evaluation proceeds to the third step, which
7 compares Plaintiff's impairment with a number of listed
8 impairments acknowledged by the Commissioner to be so severe as to
9 preclude substantial gainful activity. 20 C.F.R. §§ 404.1520(d),
10 416.920(d); 20 C.F.R. § 404 Subpt. P App. 1. If the impairment
11 meets or equals one of the listed impairments, Plaintiff is
12 conclusively presumed to be disabled. If the impairment is not
13 one conclusively presumed to be disabling, the evaluation proceeds
14 to the fourth step, which determines whether the impairment
15 prevents Plaintiff from performing work he has performed in the
16 past. If Plaintiff is able to perform his previous work, he is
17 not disabled. 20 C.F.R. §§ 404.1520(e), 416.920(e). If Plaintiff
18 cannot perform this work, the fifth and final step in the process
19 determines whether Plaintiff is able to perform other work in the
20 national economy in view of his residual functional capacity and
21 his age, education and past work experience. 20 C.F.R. §§
22 404.1520(f), 416.920(f); *Bowen v. Yuckert*, 482 U.S. 137 (1987).

23 The initial burden of proof rests upon Plaintiff to establish
24 a *prima facie* case of entitlement to disability benefits.
25 *Rhinehart v. Finch*, 438 F.2d 920, 921 (9th Cir. 1971); *Meanel v.*
26 *Apfel*, 172 F.3d 1111, 1113 (9th Cir. 1999). The initial burden is
27 met once Plaintiff establishes that a physical or mental

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1 impairment prevents him from engaging in his previous occupation.
2 The burden then shifts to the Commissioner to show (1) that
3 Plaintiff can perform other substantial gainful activity and (2)
4 that a "significant number of jobs exist in the national economy"
5 which Plaintiff can perform. *Kail v. Heckler*, 722 F.2d 1496, 1498
6 (9th Cir. 1984).

7 STANDARD OF REVIEW

8 Congress has provided a limited scope of judicial review of a
9 Commissioner's decision. 42 U.S.C. § 405(g). A court must uphold
10 the Commissioner's decision, made through an ALJ, when the
11 determination is not based on legal error and is supported by
12 substantial evidence. See *Jones v. Heckler*, 760 F.2d 993, 995
13 (9th Cir. 1985); *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9th Cir.
14 1999). "The [Commissioner's] determination that a plaintiff is
15 not disabled will be upheld if the findings of fact are supported
16 by substantial evidence." *Delgado v. Heckler*, 722 F.2d 570, 572
17 (9th Cir. 1983) (citing 42 U.S.C. § 405(g)). Substantial evidence
18 is more than a mere scintilla, *Sorenson v. Weinberger*, 514 F.2d
19 1112, 1119 n.10 (9th Cir. 1975), but less than a preponderance.
20 *McAllister v. Sullivan*, 888 F.2d 599, 601-602 (9th Cir. 1989);
21 *Desrosiers v. Secretary of Health and Human Services*, 846 F.2d
22 573, 576 (9th Cir. 1988). Substantial evidence "means such
23 evidence as a reasonable mind might accept as adequate to support
24 a conclusion." *Richardson v. Perales*, 402 U.S. 389, 401 (1971)
25 (citations omitted). "[S]uch inferences and conclusions as the
26 [Commissioner] may reasonably draw from the evidence" will also be
27 upheld. *Mark v. Celebrezze*, 348 F.2d 289, 293 (9th Cir. 1965).

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1 On review, the court considers the record as a whole, not just the
2 evidence supporting the decision of the Commissioner. *Weetman v.*
3 *Sullivan*, 877 F.2d 20, 22 (9th Cir. 1989) (quoting *Kornock v.*
4 *Harris*, 648 F.2d 525, 526 (9th Cir. 1980)).

5 It is the role of the trier of fact, not this court, to
6 resolve conflicts in evidence. *Richardson*, 402 U.S. at 400. If
7 evidence supports more than one rational interpretation, the court
8 may not substitute its judgment for that of the Commissioner.
9 *Tackett*, 180 F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577, 579
10 (9th Cir. 1984). Nevertheless, a decision supported by
11 substantial evidence will still be set aside if the proper legal
12 standards were not applied in weighing the evidence and making the
13 decision. *Browner v. Secretary of Health and Human Services*, 839
14 F.2d 432, 433 (9th Cir. 1987). Thus, if there is substantial
15 evidence to support the administrative findings, or if there is
16 conflicting evidence that will support a finding of either
17 disability or nondisability, the finding of the Commissioner is
18 conclusive. *Sprague v. Bowen*, 812 F.2d 1226, 1229-1230 (9th Cir.
19 1987).

20 ALJ'S FINDINGS

21 The ALJ found at step one that Plaintiff has not engaged in
22 substantial gainful activity since her alleged onset date,
23 February 26, 2001. (AR 100-101). At step two, the ALJ determined
24 that Plaintiff has the severe impairments of Fibromyalgia and
25 depression, but that she does not have an impairment or
26 combination of impairments listed in or medically equal to one of
27 the Listings impairments. (AR 105). The ALJ indicated that

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1 Plaintiff also has bilateral carpal tunnel syndrome, but that this
2 impairment did not meet the durational requirements of the Act.
3 (AR 105).

4 The ALJ concluded that Plaintiff has the residual functional
5 capacity ("RFC") to perform a wide range of light exertion work.
6 (AR 107). He found that Plaintiff can sit or stand for two hours
7 at a time, for a total of six hours, in an eight hour workday with
8 normal breaks, sit for six hours at a time in an eight hour
9 workday with normal breaks, should avoid frequent or prolonged
10 pushing or pulling of objects weighing 10 to 20 pounds, could
11 occasionally engage in stooping, crouching, kneeling, crawling, or
12 climbing of ramps or stairs, should avoid climbing ladders, ropes,
13 or scaffolds, and should avoid frequent or prolonged overhead
14 reaching. (AR 107). The ALJ additionally held that Plaintiff has
15 mild to moderate, frequent pain, for which she takes medication,
16 but would be able to remain reasonably attentive and responsive in
17 a work setting and would be able to carry out normal work
18 assignments satisfactorily. (AR 107). He also indicated that
19 Plaintiff could be expected to have lessened concentration,
20 persistence and pace in the workplace, but could still be
21 productive. (AR 107). With regard to Plaintiff's mental
22 limitations, the ALJ determined that Plaintiff's depression causes
23 "mild restrictions of activities of daily living, mild
24 difficulties in maintaining social functioning, moderate
25 difficulties in maintaining concentration, persistence, or pace,
26 and no episodes of decompensation." (AR 105).

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1 At step four of the sequential evaluation process, the ALJ
2 found that, based on Plaintiff's ability to perform a wide range
3 of light exertion level work, coupled with the vocational expert's
4 testimony, Plaintiff could return to her past relevant work as an
5 intake caseworker, but would not be capable of returning to her
6 past work as a family counselor due to the decrease in her
7 alertness. (AR 108). The ALJ also determined that, within the
8 framework of the Medical-Vocational Guidelines ("Grids") and based
9 on the vocational expert's testimony and Plaintiff's residual
10 functional capacity, age, education, and work experience, there
11 were a significant number of jobs in the national economy which
12 she could perform despite her limitations. (AR 108-109).
13 Examples of such jobs included work as a chemical dependency
14 trainee, work in final assembly, and work as a surveillance system
15 monitor. (AR 109). Accordingly, the ALJ determined at step four
16 of the sequential evaluation process, and alternatively at step
17 five, that Plaintiff was not disabled within the meaning of the
18 Social Security Act. (AR 108-111).

19 ISSUES

20 Plaintiff contends that the Commissioner erred as a matter of
21 law. Specifically, she argues that:

22 1. The ALJ and Appeals Council erred by failing to give
23 controlling weight to treating source medical opinions;

24 2. The ALJ and Appeals Council erred by failing to make
25 proper credibility findings as to the credibility of Plaintiff and
26 the lay witnesses;

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1 3. The ALJ and Appeals Council erred by finding Plaintiff
2 was capable of performing her past relevant work, as well as
3 performing light exertion work;

4 4. The ALJ and Appeals Council erred by failing to properly
5 evaluate Plaintiff's complaints of pain; and

6 5. The ALJ and Appeals Council erred by declining
7 Plaintiff's request for a supplemental hearing.

8 This court must uphold the Commissioner's determination that
9 Plaintiff is not disabled if the Commissioner applied the proper
10 legal standards and there is substantial evidence in the record as
11 a whole to support the decision.

12 DISCUSSION

13 **A. Credibility**

14 Plaintiff argues that the ALJ erred by failing to make proper
15 credibility findings as to Plaintiff's testimony and the testimony
16 of lay witnesses, Plaintiff's husband and Plaintiff's former
17 business partner. (Ct. Rec. 10, pp. 15-17, 18-21). With respect
18 to Plaintiff's credibility, Plaintiff specifically asserts that
19 the ALJ erred by failing to take into consideration and properly
20 evaluate her pain. (Ct. Rec. 10, pp. 18-21). The Commissioner
21 contends that the ALJ appropriately evaluated Plaintiff's pain
22 testimony and provided legally sufficient rationale for finding
23 Plaintiff's testimony not fully credible. (Ct. Rec. 17, pp. 8-
24 10).

25 It is the province of the ALJ to make credibility
26 determinations. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th Cir.
27 1995). However, the ALJ's findings must be supported by specific
28 cogent reasons. *Rashad v. Sullivan*, 903 F.2d 1229, 1231 (9th Cir.

1 1990). Once the claimant produces medical evidence of an
2 underlying impairment, the ALJ may not discredit her testimony as
3 to the severity of an impairment because it is unsupported by
4 medical evidence. *Reddick v. Chater*, 157 F.3d 715, 722 (9th Cir.
5 1998) (citation omitted). Absent affirmative evidence of
6 malingering, the ALJ's reasons for rejecting the claimant's
7 testimony must be "clear and convincing." *Lester v. Chater*, 81
8 F.3d 821, 834 (9th Cir. 1995). "General findings are
9 insufficient: rather the ALJ must identify what testimony is not
10 credible and what evidence undermines the claimant's complaints."
11 *Lester*, 81 F.3d at 834; *Dodrill v. Shalala*, 12 F.3d 915, 918 (9th
12 Cir. 1993).

13 The ALJ determined that Plaintiff's allegations regarding her
14 pain and limitations were less than fully credible. (AR 106). In
15 support of this finding, the ALJ indicated as follows:

16 (1) Plaintiff's testimony of significant pain and muscle spasms,
17 with pain all over her body, is not supported by the objective
18 evidence of record; (2) Plaintiff, on her own accord, discontinued
19 wearing splints and taking prescribed medications, despite her
20 doctors' orders and complaints of significant pain; (3)
21 Plaintiff's testimony of limiting fatigue is not supported by the
22 record which shows her engaging in numerous activities, including
23 taking care of her house and yard, swimming and other
24 social activities; (4) Plaintiff's testimony of greater
25 limitations over the past year and a half is unsubstantiated by
26 the record which displays that her condition was actually doing
27 better and that pain management was doing quite well;
28 (5) Plaintiff's reports of disabling pain and fatigue are

1 contradicted by her reports to Dr. Krause of swimming and running
2 and not needing to take her prescribed Vioxx and Dr. Krause's
3 report that claimant is capable of performing work-like
4 activities; and (6) Dr. Dicken reported inconsistencies in his
5 examinations and noted a lack of full effort by Plaintiff. (AR
6 106).

7 The ALJ notes that Plaintiff's testimony of significant pain
8 and allegations of increased limitations over the past year is not
9 supported by the objective medical evidence of record. A lack of
10 supporting objective medical evidence is a factor which may be
11 considered in evaluating an individual's credibility, provided
12 that it is not the sole factor. *Bunnell v. Sullivan*, 347 F.2d
13 341, 345 (9th Cir. 1991). The ALJ notes that an MRI exam of the
14 lumbar spine and x-rays have been essentially negative, as have
15 neurological evaluations. (AR 106). Moreover, as discussed more
16 fully below, the credible medical evidence of record, including
17 the reports from her treating physicians, does not support
18 Plaintiff's allegations of disabling pain and limitations. Since
19 the ALJ notes many factors aside from the lack of supporting
20 objective medical evidence for discounting Plaintiff's
21 allegations, the ALJ did not err in discounting Plaintiff's
22 testimony and finding that her subjective complaints regarding her
23 functional limitations were not fully credible.

24 The ALJ noted that, although Plaintiff complained she had
25 become more limited in her activities in the past year and a half,
26 the record reflected that her condition had been stable for a
27 period of time and, by January 2003, pain management was doing
28 quite well. (AR 106, 388). On March 3, 2003, Plaintiff indicated

1 that overall her fibromyalgia management was doing okay. (AR
2 391). The ALJ indicated that Plaintiff's reports of pain and
3 fatigue were contradicted by reports from her treating physician
4 revealing that she was active and not in need of her prescribed
5 medication. (AR 106, 264). The ALJ also reported that Dr. Dicken
6 noted inconsistencies in his examinations and noted a lack of full
7 effort by Plaintiff. (AR 106, 276-277).

8 The ALJ indicated that Plaintiff, on her own accord,
9 discontinued wearing splints and taking prescribed medications.
10 (AR 106). Plaintiff also reported to Dr. Krause that she had not
11 needed to take Vioxx. (AR 264). Noncompliance with medical care
12 or unexplained or inadequately explained reasons for failing to
13 seek medical treatment cast doubt on a claimant's subjective
14 complaints. 20 C.F.R. §§ 404.1530, 426.930; *Fair v. Bowen*, 885
15 F.2d 597, 603 (9th Cir. 1989). The fact that Plaintiff failed to
16 comply with the medical treatment prescribed by her physicians;
17 namely, taking her prescribed medications and continuing to wear
18 her splints, discounts her claim of disabling pain and
19 limitations.

20 With regard to her daily activities, it is well-established
21 that the nature of daily activities may be considered when
22 evaluating credibility. *Fair*, 885 F.2d at 603. The ALJ indicated
23 that Plaintiff's allegations of pain and fatigue were inconsistent
24 with the record evidence which demonstrates that she was engaged
25 in taking care of her house and yard, swimming, and doing other
26 social activities. (AR 106).

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1 Dr. Krause filled out a Fibromyalgia Residual Functional
2 Capacity Questionnaire on January 31, 2002, indicating that
3 Plaintiff was incapable of even "low stress" work but also
4 indicating that he felt Plaintiff was capable of performing low
5 stress jobs. (AR 289). In that questionnaire, Dr. Krause
6 responded to questions about Plaintiff's functional limitations in
7 a competitive work situation without indicating Plaintiff could
8 not work. (AR 289-292). On August 22, 2001, Dr. Krause noted
9 that Plaintiff had a busy summer swimming and running in the pool,
10 had not needed her Vioxx, was more cheerful and alert and
11 continued to gradually do better. (AR 264). The ALJ properly
12 found that such activities were inconsistent with Plaintiff's
13 alleged limitations and thus detracted from her credibility.

14 The ALJ is responsible for reviewing the evidence and
15 resolving conflicts or ambiguities in testimony. *Magallanes v.*
16 *Bowen*, 881 F.2d 747, 751 (9th Cir. 1989). It is the role of the
17 trier of fact, not this court, to resolve conflicts in evidence.
18 *Richardson*, 402 U.S. at 400. The court has a limited role in
19 determining whether the ALJ's decision is supported by substantial
20 evidence and may not substitute its own judgment for that of the
21 ALJ even if it might justifiably have reached a different result
22 upon de novo review. 42 U.S.C. § 405(g).

23 After reviewing the record, the undersigned judicial officer
24 finds that the reasons provided by the ALJ for discounting
25 Plaintiff's subjective complaints are sufficient and supported by
26 substantial evidence in the record. The reasons provided by the
27 ALJ for finding her allegations not fully credible are clear and
28 convincing. Accordingly, the ALJ did not err by concluding that

1 Plaintiff's subjective complaints regarding the extent of her
2 functional limitations were not fully credible in this case. (AR
3 106).

4 Plaintiff further contends that the ALJ erred by not making
5 proper credibility findings as to the testimony of lay witnesses
6 Frederic Anderson, Plaintiff's husband (AR 216-219), and
7 Plaintiff's former business partner (AR 203-207). (Ct. Rec. 10,
8 pp. 15, 17, 19, 21). The ALJ may not ignore or improperly reject
9 the **probative** testimony of a lay witness without giving reasons
10 that are germane to each witness. *Dodrill v. Shalala*, 12 F.3d
11 915, 919 (9th Cir. 1993) (emphasis added). The ALJ shall
12 "consider observations by non-medical sources as to how an
13 impairment affects a claimant's ability to work." *Sprague v.*
14 *Bowen*, 812 F.2d 1226, 1232 (9th Cir. 1987), *citing* 20 C.F.R. §
15 404.1513(e)(2).

16 Although the ALJ failed to specifically address the
17 statements of Mr. Anderson and Plaintiff's former business
18 partner, it is clear that the ALJ considered Plaintiff's
19 functional limitations. Any consideration of the testimony of
20 those lay witnesses does not indicate that Plaintiff is limited to
21 a greater extent than that found by the ALJ in this case.
22 Moreover, the lay witnesses' testimony was not expressly rejected
23 by the ALJ, and the ALJ was therefore not required to give an
24 explanation for his consideration of their testimony.
25 Accordingly, the ALJ did not err with regard to the lay witnesses'
26 testimony.

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B. Residual Functional Capacity

Plaintiff contends that the ALJ erred by concluding that she could perform light exertion work and that she could return to her past relevant work as an intake coordinator. (Ct. Rec. 10, pp. 18-21). Plaintiff essentially asserts that the ALJ's RFC finding is not supported by substantial evidence in this case. (Ct. Rec. 10, pp. 18-21). In making this argument, Plaintiff contends that the ALJ erred by failing to give controlling weight to the medical opinions of Plaintiff's treating physicians Charles E. Krause, M.D., and Donald G. Dicken, M.D., P.C. (Ct. Rec. 10, pp. 13-15). In a disability proceeding, the treating physician's opinion is given special weight because of his familiarity with the claimant and his physical condition. *Fair v. Bowen*, 885 F.2d 597, 604-05 (9th Cir. 1989). To reject the treating physician's opinion, the ALJ must state specific, legitimate reasons that are supported by substantial evidence. *Flaten v. Secretary of Health and Human Serv.*, 44 F.3d 1453, 1463 (9th Cir. 1995); *Fair*, 885 F.2d at 605. The Commissioner responds that the ALJ appropriately evaluated the medical evidence of record. (Ct. Rec. 17, pp. 7-8).

1. Dr. Krause

On January 14, 2000, Dr. Krause reported that Plaintiff was doing well in a number of ways and that her Fibromyalgia, with depression, was stable with significant improvement since starting on the medication Neurontin. (AR 254). On April 7, 2000, it was reported that Plaintiff attended a convention in Las Vegas, the Neurontin was helping as she did not require as long of a nap, and she had more energy. (AR 255). On June 15, 2000, Dr. Krause

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1 indicated that Plaintiff was feeling "pretty good" on the
2 Neurontin despite current stressors. (AR 257). He diagnosed
3 Plaintiff with depression, Fibromyalgia, and hypothyroidism. (AR
4 257).

5 On October 13, 2000, Plaintiff reported to Dr. Krause that
6 she had lost weight due to performing "lots of yard work." (AR
7 258). However, Plaintiff also reported her Fibromyalgia symptoms
8 had been worse and she had been experiencing fatigue. (AR 258).

9 On November 20, 2000, Plaintiff indicated her symptoms were
10 minimally better but that an increase in Neurotin had not helped
11 much. (AR 259). On December 29, 2000, Dr. Krause noted that
12 claimant was feeling better overall and had a little more energy.
13 (AR 260).

14 On January 30, 2001, Dr. Krause indicated that claimant was
15 having severe low back muscle spasms and could barely tolerate her
16 two and one-half day work week. (AR 261). On January 30, 2001,
17 Dr. Krause also wrote a letter recommending that Plaintiff take
18 six months leave from work to allow her body to recover and to
19 reduce stress. (AR 252). Dr. Krause opined that Plaintiff's
20 Fibromyalgia, stress and other medical problems were aggravated by
21 the stress of her job. (AR 252).

22 On March 27, 2001, Plaintiff indicated to Dr. Krause that she
23 had been doing "a lot of yard work and things that make her sweat
24 and use her body." (AR 262). Plaintiff indicated that she was
25 not missing her former job and was happy to be away from it. (AR
26 262). On May 11, 2001, Plaintiff reported to doing fairly well.
27 (AR 263). Dr. Krause diagnosed Fibromyalgia, depression and
28 chronic pain. (AR 263).

1 On August 22, 2001, Dr. Krause noted that Plaintiff had a
2 busy summer swimming and running in the pool, had not needed her
3 Vioxx and was more cheerful and alert. (AR 264). He indicated
4 that Plaintiff continued to gradually do better, but had
5 experienced some setbacks. (AR 264).

6 On September 18, 2001, Dr. Krause noted that Plaintiff seemed
7 to be spiraling down with no known cause. (AR 265). Plaintiff
8 reported to being lethargic, having no energy, and being worse
9 since her last visit. (AR 265). On September 18, 2001, Dr.
10 Krause referred Plaintiff to Dr. Dicken for an evaluation of
11 Plaintiff's Fibromyalgia. (AR 253).

12 On January 3, 2002, Dr. Krause indicated that Plaintiff's
13 fatigue remained very high, sleep was poor and she seemed to hurt
14 all over. (AR 318). On January 31, 2002, Dr. Krause indicated
15 that Dr. Dicken had nothing new to add to his management of
16 Plaintiff. (AR 318). He indicated that he filled out a report
17 "apparently from her lawyer about her disability." (AR 318).

18 On January 31, 2002, Dr. Krause filled out a Fibromyalgia
19 Residual Functional Capacity Questionnaire. (AR 287-292). Dr.
20 Krause indicated that he had been treating Plaintiff since 1990
21 for Fibromyalgia, depression, insomnia, hypothyroidism, menopause
22 symptoms, and peripheral edema. (AR 287). He noted that he did
23 not believe Plaintiff was a malingerer. (AR 288). Dr. Krause
24 opined that Plaintiff was capable of performing low stress jobs
25 due to the fact that sometimes she can tolerate the high stress in
26 her everyday life. (AR 289).

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1 With regards to her limitations, Dr. Krause found Plaintiff
2 capable of walking one mile on a good day but only one-quarter of
3 a mile on a bad day and sitting or standing continuously for 20 to
4 30 minutes at one time. (AR 289). In an eight-hour workday, Dr.
5 Krause opined that Plaintiff could sit and stand/walk about two
6 hours each, with normal breaks. (AR 289). Dr. Krause
7 additionally indicated that Plaintiff would need periods of
8 walking around during an eight-hour workday, would need a job
9 which permits shifting positions at will from sitting, standing or
10 walking, would need to take unscheduled breaks every one to two
11 hours, for about 10 to 20 minutes at a time, would need to lie
12 down or sit quietly once a day, and, with prolonged sitting, would
13 need to elevate her legs six to 12 inches. (AR 280). Dr. Krause
14 opined that Plaintiff could occasionally lift and carry 20 pounds
15 and frequently lift and carry 10 pounds or less, but would have
16 significant limitations in doing repetitive reaching, handling or
17 fingering. (AR 291).

18 On March 4, 2002, Plaintiff visited Dr. Krause and complained
19 of a lack of sleep at night, hot flashes and persistent pain. (AR
20 319). On April 15, 2002, Dr. Krause noted that Plaintiff brought
21 in a list of about nine different problems, including hot flashes,
22 weight gain, bruising, muscle pain, chronic pains, depression,
23 blood pressure issues, muscle twitching and insomnia, but did not
24 want Dr. Krause to perform tests on her because she did not have
25 insurance. (AR 321). On May 15, 2002, Dr. Krause diagnosed
26 claimant with menopause, better control, Fibromyalgia, stable,

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1 depression, stable, and chronic pain, stable. (AR 322). On July
2 15, 2002, Dr. Krause assessed Fibromyalgia, depression, elevated
3 blood pressure and trigger points. (AR 323).

4 On September 13, 2002, Dr. Krause indicated that every part
5 of Plaintiff's body that he touched hurts her, including her face,
6 shoulders, arms, and legs. (AR 362). Plaintiff reported to be
7 doing much worse. On September 27, 2002, Plaintiff was feeling
8 significantly better, had a little more energy and was able to do
9 30 minute walks. (AR 363).

10 Consistent with the ALJ's RFC determination, Dr. Krause
11 concluded that claimant could perform light exertion work with
12 limitations in doing repetitive reaching. (AR 291). Also
13 consistent with the ALJ's RFC determination, Dr. Krause opined
14 that Plaintiff could sit and stand/walk about two hours each, with
15 normal breaks, in an eight-hour workday. (AR 289). It is
16 significant to note that Dr. Krause specifically indicated that
17 Plaintiff was capable of performing a low stress job. (AR 289).
18 Accordingly, contrary to Plaintiff's assertion, the ALJ clearly
19 relied on Dr. Krause's opinions in formulating his RFC assessment.

20 **2. Dr. Dicken**

21 On November 6, 2001, Plaintiff presented to Dr. Dicken
22 complaining primarily of symptoms related to Fibromyalgia. (AR
23 273). Plaintiff reported that she began developing diffuse pain
24 about 10 to 11 years ago and had been previously treated for
25 possible rheumatoid arthritis which was proven not the case. (AR
26 273). She had been placed on various medications and had recent
27 laboratory work completed by Dr. Krause which was essentially
28 unremarkable. (AR 273). Plaintiff reported her symptoms had been

1 getting worse, yet she also reported she felt better since she
2 stopped working in February of 2001. (AR 273). On examination of
3 her upper and lower extremities, Dr. Dicken noted there were no
4 signs of any joint deformities, swelling or arthritic changes, no
5 signs of muscle atrophy or asymmetry and no significant orthopedic
6 abnormalities detected. (AR 275). An examination of her spine
7 revealed no significant curvatures or deformities, but did reveal
8 muscle spasming and tightness in the cervical and lumbar areas and
9 numerous tender points throughout. (AR 275-276). Dr. Dicken
10 noted that testing on grip strength revealed a lack of full effort
11 by Plaintiff. (AR 276-277). Dr. Dicken found that Plaintiff had
12 a tender point distribution and control points consistent with
13 Fibromyalgia Syndrome. (AR 276-277).

14 On January 7, 2002, Plaintiff followed up with Dr. Dicken.
15 (AR 301). Her physical examination was unchanged from her initial
16 evaluation and Dr. Dicken assessed probable Fibromyalgia Syndrome
17 and a history of depression. (AR 301).

18 On July 15, 2002, Dr. Dicken indicated that Plaintiff was
19 doing reasonably well. (AR 302). Plaintiff complained of some
20 pain along the left side of her neck and some numbness in both
21 hands that she believed was getting gradually worse. (AR 302).
22 Dr. Dicken diagnosed probable Fibromyalgia Syndrome, a history of
23 depression and complaints of hand numbness ongoing for the last
24 four months. (AR 302).

25 On August 14, 2002, Dr. Dicken examined Plaintiff for
26 numbness in both of her hands and chronic neck pain. (AR 84-86,
27 304-306, 381-383). His examination revealed no evidence of

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1 peripheral nerve injury, entrapment or neuropathy in either upper
2 extremity. (AR 86, 306, 383). Nevertheless, Dr. Dicken assessed
3 moderate bilateral carpal tunnel syndrome. (AR 86, 306, 383).

4 On October 7, 2002, Plaintiff reported to Dr. Dicken with
5 right sided low back and buttocks pain as well as right ankle and
6 foot pain. (AR 82, 384). Dr. Dicken examined Plaintiff's lumbar
7 area finding no abnormal curvatures or muscle spasm. His
8 examination revealed complaints of pain and a decreased range of
9 motion, but no muscle atrophy or asymmetry and no focal weakness
10 of the lower extremities. (AR 82-83, 384-385). He assessed
11 complaints of right sided low back and buttocks pain, probable
12 Fibromyalgia Syndrome with complaints of diffuse pain, lack of
13 restorative sleep and chronic fatigue, history of depression, and
14 history of moderate bilateral carpal tunnel syndrome. (AR 83,
15 385).

16 On November 4, 2002, Dr. Dicken indicated that Plaintiff was
17 doing about the same as far as her Fibromyalgia symptoms were
18 concerned. (AR 80, 386). Plaintiff indicated that Amitriptyline
19 and Vioxx had helped, and, overall, she was doing reasonably well.
20 (AR 80, 386). Dr. Dicken assessed probable Fibromyalgia Syndrome
21 with complaints of diffuse pain, lack of restorative sleep and
22 chronic fatigue, complaints of low back pain with an essentially
23 unremarkable MRI, complaints of right medial ankle pain, history
24 of depression, and moderate bilateral carpal tunnel syndrome. (AR
25 80, 386).

26 On January 27, 2003, Dr. Dicken noted that Plaintiff was
27 "doing better," with regard to her Fibromyalgia pain management.
28 (AR 77, 388). He indicated that medication appeared to help her

1 sleep and that Vioxx also seemed to help. (AR 77, 388). He
2 assessed probable Fibromyalgia Syndrome with complaints of diffuse
3 pain, lack of restorative sleep and chronic fatigue, bilateral
4 carpal tunnel syndrome of moderate severity, history of low back
5 pain with negative MRI, history of depression and complaints of
6 right medial ankle pain with negative x-rays. (AR 77, 388).

7 On February 19, 2003, Dr. Dicken examined Plaintiff and
8 compared a prior nerve conduction study, performed on August 14,
9 2002, to a study performed the day of the exam. (AR 74-75, 389-
10 390). Dr. Dicken opined that Plaintiff had moderately severe left
11 carpal tunnel syndrome which had gotten worse since the August 14,
12 2002 examination and moderate right carpal tunnel syndrome which
13 had not regressed since August of 2002. (AR 75, 390).

14 On March 3, 2003, Dr. Dicken noted that Plaintiff revealed
15 that overall her Fibromyalgia management was doing okay. (AR 78,
16 391). Plaintiff mainly complained of increasing symptoms in her
17 carpal tunnel syndrome in both upper extremities. Dr. Dicken
18 assessed probable Fibromyalgia Syndrome with complaints of diffuse
19 pain, lack of restorative sleep and chronic fatigue, bilateral
20 carpal tunnel syndrome of moderate severity (the left slightly
21 more severe than the right), history of low back pain with
22 negative MRI, and history of depression. (AR 78, 391). Dr.
23 Dicken indicated that, pursuant to Plaintiff's request, he would
24 be arranging for a referral for an orthopedic surgery consultation
25 for possible carpal tunnel release. (AR 78, 391).

26 Although Dr. Dicken did not explicitly assess Plaintiff's
27 limitations, his reports and findings give insight into
28 Plaintiff's condition, which the ALJ relied upon in this case.

1 Despite complaints of pain and fatigue, Dr. Dicken consistently
2 found that Plaintiff was doing reasonably well and that her
3 Fibromyalgia management was doing well. Plaintiff's complaints to
4 Dr. Dicken appeared to be primarily based on hand pain and
5 numbness. The ALJ addressed these findings by concluding that
6 Plaintiff should avoid frequent or prolonged pushing or pulling of
7 objects weighting 10 to 20 pounds and should additionally avoid
8 frequent or prolonged overhead reaching. (AR 110). Contrary to
9 Plaintiff's assertion, the ALJ relied on Dr. Dicken's opinions in
10 formulating his RFC assessment in this case.

11 Plaintiff offers no credible evidence to contradict the ALJ's
12 RFC determination. The ALJ's findings regarding Plaintiff's
13 limitations and RFC are supported by the weight of the evidence of
14 record, including the opinions of Drs. Krause and Dicken, and are
15 based on proper legal standards. Thus, there is no error with
16 regard to the ALJ's RFC determination in this case. The evidence
17 of record supports the ALJ's conclusion that Plaintiff is capable
18 of performing a light exertion work, with the restrictions noted.

19 **3. Plaintiff's Ability to Work**

20 Plaintiff contends that the ALJ erred by finding her capable
21 of performing her past relevant work or other light level work
22 existing in the national economy. (Ct. Rec. 10, pp. 18-21).
23 The Commissioner responds that since the ALJ properly found
24 Plaintiff's testimony not fully credible and properly weighed the
25 medical evidence of record, the ALJ's RFC finding is without error
26 and the resultant step four and step five determinations of the

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1 ALJ were also without error. (Ct. Rec. 17, pp. 10-11). The
2 Commissioner thus argues that, given the ALJ's accurate RFC
3 determination, the ALJ properly relied on the vocational expert's
4 testimony to find that Plaintiff could perform her past relevant
5 work as an intake counselor as well as other work existing in
6 sufficient numbers in the national economy. (Ct. Rec. 17, pp. 10-
7 11).

8 The ALJ concluded that Plaintiff has the RFC to perform a
9 wide range of light exertion work in this case. (AR 107). He
10 found that Plaintiff can sit or stand for two hours at a time, for
11 a total of six hours, in an eight hour workday with normal breaks,
12 sit for six hours at a time in an eight hour workday with normal
13 breaks, should avoid frequent or prolonged pushing or pulling of
14 objects weighing 10 to 20 pounds, could occasionally engage in
15 stooping, crouching, kneeling, crawling, or climbing of ramps or
16 stairs, should avoid climbing ladders, ropes, or scaffolds, and
17 should avoid frequent or prolonged overhead reaching. (AR 107).
18 The ALJ additionally held that Plaintiff has mild to moderate,
19 frequent pain, for which she takes medication, but would be able
20 to remain reasonably attentive and responsive in a work setting
21 and would be able to carry out normal work assignments
22 satisfactorily. (AR 107). In making this determination, the ALJ
23 carefully considered and fully addressed the medical reports of
24 Drs. Krause and Dicken. (AR 101-105).

25 Based on Plaintiff's ability to perform light exertion level
26 work, coupled with the vocational expert's testimony, the ALJ
27 found that Plaintiff could return to her past relevant work as an

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1 intake caseworker. (AR 108). The ALJ also determined that,
2 within the framework of the Grids, and based on the vocational
3 expert's testimony and Plaintiff's residual functional capacity,
4 age, education, and work experience, there were a significant
5 number of jobs in the national economy which she could perform
6 despite her limitations. (AR 108-109). Examples of such jobs
7 noted by the ALJ included work as a chemical dependency trainee,
8 work in final assembly, and work as a surveillance system monitor.
9 (AR 109).

10 The ALJ's credibility and RFC findings were supported by
11 substantial evidence. Accordingly, the hypotheticals presented to
12 the vocational expert and relied upon by the ALJ in making his
13 disability determination were also appropriate. The ALJ's
14 conclusion that there is work available which Plaintiff is capable
15 of performing is thus based upon substantial evidence and free of
16 legal error.

17 **C. Fully and Fairly Develop the Record**

18 Plaintiff lastly asserts that the ALJ erred by failing to
19 hold a supplemental hearing, following the entering of new
20 exhibits into the record and following a request made by
21 Plaintiff, through counsel, for the holding of a supplemental
22 hearing. (Ct. Rec. 10, pp. 21-22). Plaintiff argues that,
23 because a supplemental hearing was not held, she was denied due
24 process and the record was not fully and fairly developed. (Ct.
25 Rec. 10, p. 22). The Commissioner responds that the ALJ fully and
26 fairly developed the record and was under no duty to order a
27 supplemental hearing. (Ct. Rec. 17, pp. 11-12).

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1 The ALJ has a duty to fully and fairly develop the record.
2 *Brown v. Heckler*, 713 F.2d 441, 443 (9th Cir. 1983). The ALJ is
3 required to take steps to obtain additional evidence where the
4 medical evidence of record is insufficient to determine whether a
5 claimant is disabled. 20 C.F.R. §§ 404.1512(e), 416.912(e). If a
6 claimant can demonstrate prejudice or unfairness as a result of
7 the ALJ's failure to fully and fairly develop the record, the
8 decision may be set aside. *Vidal v. Harris*, 637 F.2d 710, 713
9 (9th Cir. 1991). Accordingly, with respect to the ALJ's duty to
10 develop the record, the Ninth Circuit places the burden of proving
11 prejudice or unfairness on Plaintiff.

12 Plaintiff asserts that the ALJ erred by failing to hold a
13 supplemental hearing as a result of new documents entered into the
14 record following the administrative hearing and prior to the ALJ's
15 decision in this matter. (Ct. Rec. 10, pp. 21-22). Plaintiff
16 complains about not having a supplemental hearing following the
17 submission of additional medical records from Dr. Krause (AR 360-
18 380) and the Medical Source Statement of Ability to do Work-
19 Related Activities (Physical) filled out by Dr. Willkens on
20 September 15, 2002 (AR 356-359). (Ct. Rec. 10, pp. 21-22).

21 Plaintiff argues "in particular," that submission of the form
22 completed by Dr. Willkens, without the possibility to cross-
23 examine Dr. Willkens regarding that information, created
24 prejudice. (Ct. Rec. 10, p. 22). However, Plaintiff was
25 presented with an opportunity to cross-examine Dr. Willkens as
26 to the limitations expressed in the form at the time of the

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1 administrative hearing, since the limitations noted by Dr.
2 Willkens on the form were identical to those he assessed at the
3 time of the administrative hearing. (AR 428-430). Furthermore,
4 and most important, the ALJ chose to reject those findings when
5 making his RFC determination in this case, concluding that
6 Plaintiff was much more limited than Dr. Willkens assessed.
7 (AR 107). Plaintiff also fails to allege or demonstrate any
8 prejudice related to the submission of the medical records of Dr.
9 Krause.

10 Based on the foregoing, Plaintiff has failed to demonstrate
11 any prejudice or unfairness. There was sufficient evidence in the
12 record from which the ALJ could make his determination; therefore,
13 further inquiry regarding Plaintiff's condition was not required.
14 Accordingly, the ALJ fulfilled his duty of fully and fairly
15 developing the record and a supplemental hearing was not warranted
16 in this case.

17 CONCLUSION

18 Having reviewed the record and the ALJ's conclusions, this
19 Court finds that the ALJ's decision that Plaintiff is capable of
20 performing a wide range of light exertion work, with the
21 limitations noted, including her past work as an intake caseworker
22 as well as other work existing in sufficient numbers in the
23 national economy, is supported by substantial evidence and free of
24 legal error. Plaintiff is thus not disabled within the meaning of
25 the Social Security Act. Accordingly,

26 **IT IS ORDERED:**

27 1. Plaintiff's Motion for Summary Judgment (Ct. Rec.
28 9) is **DENIED**.

3. The District Court Executive is directed to enter judgment in favor of Defendant, file this Order, provide a copy to counsel for Plaintiff and Defendant, and **CLOSE** this file.

DATED this 16th day of November, 2005.

s/ Michael W. Leavitt
MICHAEL W. LEAVITT
UNITED STATES MAGISTRATE JUDGE